APPENDIX

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 14th day of June, one thousand nine hundred and eighty-two.

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

FILED JUNE 14, 1982
A. Daniel Fusaro, Clerk

Present:

HONORABLE WILFRED FEINBERG
Chief Judge

HONORABLE RICHARD J. CARDAMONE
Circuit Judge

HONORABLE LEONARD B. SAND*
District Judge

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* Honorable Leonard B. Sand, of the United States District Court for the Southern District of New York, sitting by designation.

Opinion

81-1471
81-1473
81-1475
81-1477

UNITED STATES OF AMERICA,

Appellee,

v.

ROBERT WYLER, DIANNE BECKER, JASPER ALEXANDER BANKS, and FONDA HOLMES,

Defendants-Appellants.

ORDER

Defendants appeal from judgments of conviction entered on November 24, 1981 following a jury trial in the United States District Court for the Southern District of New York (Ward, J.). They were charged with and found guilty of multiple counts stemming from an attempt to effectuate Wyler's escape from the Metropolitan Correctional Center (MCC) by means of an allegedly hijacked helicopter forced to land on a rooftop exercise yard. For the reasons discussed below we affirm the convictions.

1. Motions to sever trial

The district court denied motions made by Wyler and Becker to sever their trials from Holmes. It was their contention that regardless of whether Holmes took the stand at her own trial, a severance would permit her to offer exculpatory evidence on

their behalf. Holmes had executed affidavits for Wyler and Becker stating that if she were to be tried first, she would testify at their trial that the hijacking was beyond the scope of the conspiracy to effectuate Wyler's escape, which was planned with the pilot's cooperation, and that Becker had withdrawn from the conspiracy. Bank's request for a severance from all his codefendants, on the ground that his defense was inconsistent with theirs, was also denied.

A motion to sever is within the trial court's discretion, Fed. R. Crim. P. 14; *Opper v. United States*, 348 U.S. 84, 95 (1954), and its denial will not be overturned unless there is a showing of "substantial prejudice," *United States v. Stirling*, 571 F.2d 708, 733 (2d Cir.), *cert. denied*, 439 U.S. 824 (1978). When a defendant seeks a severance on the ground that a codefendant would offer exculpatory evidence, one of the factors to be considered is the likelihood that the exculpatory testimony would be subject to substantial impeachment. *United States v. Finkelstein*, 526 F.2d 517, 523-24 (2d Cir. 1975), *cert. denied*, 425 U.S. 960 (1976).

If called as a defense witness by Wyler and Becker in a separate trial, Holmes would be in the anomalous position of denying the hijacking after having been convicted of it. The Government has already demonstrated its ability to impeach Holmes' testimony, since it successfully impeached the no-hijacking theory at defendants' joint trial. Moreover, any testimony by Holmes that Becker withdrew from the conspiracy could readily be impeached by Holmes' prior inconsistent statement that Becker was never in on the plan in the first place, and by Becker's own fugitive-like behavior following the escape attempt.

Opinion

Banks' defense of mistaken identity is not inconsistent with the defense asserted by the other defendants and would not therefore necessitate a separate trial. Consequently, the district court did not abuse its discretion in denying the motions to sever.

2. Wyler's claim of poisoning as a ground for escape

The district court also denied Wyler's request to present the defense that he had to escape from the MCC because he had been harassed, physically and mentally abused, beaten and poisoned (later modified to simply the poisoning claim). In order to present to a jury the affirmative defense of necessity requiring a prison escape, a defendant must show that: (1) he was faced with a specific threat of substantial bodily injury in the immediate future, (2) he had no time for complaint to authorities or a history of futile complaints, (3) he did not use force toward prison personnel or innocent persons in the escape attempt, and (4) he intended to report immediately to the authorities upon attaining a position of safety from the treat. *United States v. Boomer,* 571 F.2d 543, 545 (10th Cir.), *cert. denied,* 436 U.S. 911 (1978).

Wyler offered to prove only that on December 29, 1981 he was poisoned by prison food. A corrections officer who was supposedly going to testify that he found Wyler in a half paralyzed, unconscious state on his cell floor instead testified that Wyler complained he wasn't feeling well and had a temperature. Wyler also stated that an attorney, Mari, would testify that Wyler had complained to him of food poisoning as part of a pattern of harassment. All Wyler produced to substantiate his offer was a letter Mari wrote to the MCC stating that Wyler looked ill during a December 29, 1980 visit and Mari was later informed that Wyler believed that his condition may have been caused by tainted food; no assertion of poisoning was made.

Not only does this evidence fail to demonstrate a specific threat of immediate injury, but the episodes with respect to which the offer of proof was made took place after the escape preparation had begun. Further, there was clear evidence that he used force towards prison personnel and innocent persons, and that plans were made by defendants to go to Canada or hide out in Chelsea or New Jersey rather than report immediately to the authorities after the escape. The most telling bit of evidence against this defense is that on January 19, 1982 Wyler himself specifically requested a court order to enable him to *remain* at the MCC. Hence, the court was fully justified in denying defendant the right to present this defense.

3. Becker's claim that her attorney had a conflict of interest

Becker claims that her attorney, a firm partner in the same law firm as Wyler's attorney, ineffectively assisted her and refused to present certain defenses — i.e., that she had not agreed to a hijacking and had withdrawn from the conspiracy — because he did not want to jeopardize Wyler's case. Becker, who failed to object to multiple representation at trial, must show on appeal that an actual conflict of interest adversely affected her lawyer's performance. *Cuyler v. Sullivan*, 446 U.S. 335, 348 (1980). Wyler's defense was that there was no hijacking; Becker's attorney essentially joined in this defense. The no-hijacking theory is not in conflict with either of Becker's proposed defenses. Hence, even if Becker's attorney did not present the withdrawal from the conspiracy and lack of agreement to hijack defenses to her satisfaction, his failure cannot be said to have been due to a conflict with Wyler's case. In short, Becker has failed to demonstrate any actual conflict of interest.

4. Becker's claim of insufficiency of evidence

Becker also asserts that the evidence against her on the hijacking related counts 2, 3 and 4 is insufficient to sustain her conviction. After conviction the evidence must be viewed in a light most favorable to the government, drawing all rational inferences in support of the guilty verdict. *See Glasser v. United States,* 315 U.S. 60, 80 (1942). Becker was convicted on the conspiracy count and does not claim insufficiency of the evidence on that charge. Under the law of conspiracy she would be liable for all acts of co-conspirators which were in furtherance of and not beyond the scope of the conspiracy. *See Pinkerton v. United States,* 328 U.S. 640, 645-48 (1946). After Mercado had told Becker of Wyler's plan to hijack a pilot, Becker continued to participate in the scheme. Hence, viewing the evidence in a light most favorable to the government, the hijacking was not beyond the scope of the conspiracy and she is answerable for the charges stemming from it.

5. Wyler's Fifth Amendment claim

The district court permitted the government to introduce Redmond's testimony that he had had a conversation about the escape with Wyler sometime after the attempt had failed and that Wyler had said nothing to indicate the pilot was in on the deal or had received money. Wyler claims this testimony violated his Fifth Amendment right to remain silent and was inadmissible hearsay. The right to remain silent applies to custodial interrogation by law enforcement authorities, *Miranda v. Arizona,* 384 U.S. 436 (1966), and to a defendant's refusal to testify at trial, *Griffin v. California,* 380 U.S. 690 (1965). It has no application to a conversation between Redmond and Wyler. Hence, Wyler's Fifth Amendment claim is spurious. Even

assuming that this evidence was inadmissible hearsay, its admission constitutes harmless error.

6. Hearsay statement of helicopter pilot

Officer Yacca, who heard pilot Nietsche's account of the hijacking right after it occurred, was permitted at trial to relate much of what Nietsche told him. Defendants urge that this testimony was inadmissible hearsay. Its purpose was to give evidence of Nietsche's state of mind and demeanor to indicate that he had indeed been hijacked. That portion of the evidence which referred to Nietsche's demeanor was admissible because, in order to prove that there had been a hijacking, the government needed to prove the element of intimidation, force or violence. *See United States v. Zito*, 467 F.2d 1401, 1404 (2d Cir. 1972). As for the rest of the testimony, in view of the cautionary instructions given by the trial court we do not believe it was error to admit it. However, even were it inadmissible, this brief recounting of the same evidence which Nietsche had testified to was merely cumulative and falls within the harmless error standard.

7. Testimony before the grand jury

Defendants urge this Court to dismiss the indictment because the grand jury heard hearsay evidence. Hearsay testimony may be presented to a grand jury, *Costello v. United States*, 350 U.S. 359 (1956), so long as the jury is not misled as to its hearsay nature, *United States v. Estepa*, 471 F.2d 1132, 1336 (2d Cir. 1972). Here the grand jury was informed that the hijacking testimony it heard was hearsay. Even though Redmond was asked leading questions an indictment may not normally be attacked by contesting such matters as compliance with evidentiary rules. *See United States v. Calandra*, 414 U.S. 338, 349 (1974). Finally, it is claimed that

pilot Berg perjured himself before the grand jury. Such fact did not come to light until the eve of trial. Considering all of the evidence presented (e.g., Redmond's testimony that Wyler told him he was planning a hijacking), it is highly doubtful that the grand jury would not have returned the indictments even had they known this additional fact.

s/ Wilfred Feinberg
WILFRED FEINBERG
Chief Judge

s/ Richard J. Cardamone
RICHARD J. CARDAMONE
Circuit Judge

s/ Leonard B. Sand
LEONARD B. SAND
District Judge

AFFIDAVITS OF FONDA HOLMES DATED APRIL 30, 1981

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

-against-

ROBERT WYLER, et al.,

Defendants.

STATE OF NEW YORK)
ss.:
COUNTY OF NEW YORK)

FONDA HOLMES, being duly sworn, deposes and says:

I make this affidavit in support of a motion by Dianne Becker, a defendant in the above-captioned case, for a severance. The factual allegations herein are based on personal knowledge, information and belief and conversations I have had with my attorney and Ms. Becker's attorney.

I am a co-defendant in the above-captioned case. I do not intend to take the stand in my own defense or to waive my Fifth Amendment right against self-incrimination so long as the charges against me are pending. If, however, Ms. Becker's trial were severed, and were conducted after the conclusion of the proceedings against me, I would waive my Fifth Amendment right and testify in her behalf.

The government's theory of this case is that Ms. Becker conspired with myself and others to effectuate the escape of co-

Affidavits of Fonda Holmes Dated April 30, 1981

defendant Robert Wyler from the Metropolitan Correctional Center in New York City (Count I). According to the government, we intended to carry out this escape by hijacking a helicopter, if necessary, and forcing its pilot to fly to the roof of the M.C.C. where we would pick up Mr. Wyler (Count II).

I would testify that although Ms. Becker and I had agreed to attempt to effectuate the escape of Mr. Wyler from M.C.C. by means of a helicopter, we had also agreed to do so only if the helicopter pilot could be bribed into cooperating with us in that escape. Ms. Becker never participated in any agreement and never indicated in any way that she agreed to hijacking a helicopter in order to accomplish the escape.

Moreover, following a meeting with myself and the helicopter pilot at Sarge's Deli on the morning of January 25, 1981, Ms. Becker informed me that she no longer wanted to participate in the escape attempt and was opposed to any further steps being taken by anyone to carry it out.

Since Ms. Becker was not present in the helicopter or at the M.C.C. that day, she had no way of knowing what actually occurred at either of those locations.

s/ Fonda Holmes
FONDA HOLMES

Sworn to before me this
30th day of April, 1981

(illegible)

Affidavits of Fonda Holmes Dated April 30, 1981

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

-against-

ROBERT WYLER, et al.,

Defendants.

STATE OF NEW YORK)
ss.:
COUNTY OF NEW YORK)

FONDA HOLMES, being duly sworn, deposes and says:

I make this affidavit in support of a motion by Robert Wyler, a defendant in the above-captioned case, for a severance. The factual allegations herein are based on personal knowledge, information and belief and conversations I have had with my attorney and Mr. Wyler's attorney.

I am a co-defendant in the above-captioned case. I do not intend to take the stand in my own defense or to waive my Fifth Amendment right against self-incrimination so long as the charges against me are pending. If, however, Mr. Wyler's trial were severed, and were conducted after the conclusion of the proceedings against me, I would waive my Fifth Amendment right and testify in his behalf.

The government's theory of this case is that Mr. Wyler conspired with myself and others to effectuate his escape from

the Metropolitan Correctional Center in New York City (Count I). According to the government, we intended to carry out this escape by hijacking a helicopter, if necessary, and forcing its pilot to fly to the roof of the M.C.C. where we would pick up Mr. Wyler (Count II).

I would testify that although Mr. Wyler and I had agreed to attempt to effectuate his escape by means of a helicopter from M.C.C. we had also agreed to do so only if the helicopter pilot could be bribed into cooperating with us in that escape. Mr. Wyler never participated in any agreement and never indicated in any way that he agreed to hijack a helicopter in order to accomplish the escape.

Since Mr. Wyler was not present at the airport or in the helicopter on January 25, 1981, he had no way of knowing what transpired between the helicopter pilot and myself.

s/ Fonda Holmes
FONDA HOLMES

Sworn to before me this
30th day of April, 1981

(illegible)

AFFIDAVIT OF FONDA HOLMES DATED JULY 13, 1981

SSS 81 Cr. 0054 (RJW)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

-against-

ROBERT WYLER, et al.,

Defendants.

STATE OF NEW YORK)
ss.:
COUNTY OF NEW YORK)

FONDA HOLMES, being duly sworn, deposes and says:

I am a defendant in the above-captioned case. I make this affidavit in support of the previously filed motions by co-defendants Wyler and Becker to have their trials severed from my trial.

In addition to my previous affidavits in support of these motions, I hereby state that after my own trial is concluded, I will waive my Fifth Amendment rights and testify at the trial or trials of Wyler and Becker even if I am convicted and Wyler and Becker's trials are conducted before my direct appeal is completed.

s/ Fonda Holmes
FONDA HOLMES

Sworn to before me this
13th day of July, 1981

(illegible)